

**In re: JERRY GOETZ, d/b/a JERRY GOETZ AND SONS.**  
**BPRA Docket No. 94-0001.**  
**Order Lifting Stay.**  
**Filed January 17, 2002.**

Sharlene A. Deskins, for Complainant.  
David R. Klaassen, for Respondent.  
*Order issued by William G. Jensen, Judicial Officer.*

### **PROCEDURAL HISTORY**

On November 3, 1997, I issued a “Decision and Order”: (1) concluding that Jerry Goetz, d/b/a Jerry Goetz and Sons [hereinafter Respondent], willfully violated the Beef Promotion and Research Order and the Rules and Regulations (7 C.F.R. §§ 1260.101-.316) [hereinafter the Beef Order]; (2) ordering Respondent to cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Act] and the Beef Order; (3) assessing Respondent a \$69,244.51 civil penalty; and (4) ordering Respondent to pay past-due assessments and late-payment charges of \$66,577 to the Kansas Beef Council. *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997).

On November 12, 1997, Kenneth C. Clayton, Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed “Complainant’s Motion for Reconsideration,” and on November 17, 1997, Respondent filed a “Petition for Reconsideration of the Decision of the Judicial Officer.” On April 3, 1998, I issued an “Order Denying Respondent’s Petition for Reconsideration and Denying in Part and Granting in Part Complainant’s Petition for Reconsideration.” *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent’s Pet. for Recons. and Denying in Part and Granting in Part Complainant’s Pet. for Recons.). Based on my granting Complainant’s Motion for Reconsideration in part, I did not reinstate the Order in the Decision and Order issued November 3, 1997, but, instead, issued a new Order: (1) ordering Respondent to cease and desist from violating the Beef Act and the Beef Order; (2) assessing Respondent a \$69,804.49 civil penalty; and (3) ordering Respondent to pay past-due assessments and late-payment charges of \$66,913 to the Kansas Beef Council. *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent’s Pet. for Recons. and Denying in Part and Granting in Part Complainant’s Pet. for Recons.).

On June 22, 1998, Respondent filed a “Motion for an Order Staying Enforcement” [hereinafter Motion for a Stay] requesting a stay pending proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent’s Pet. for Recons. and Denying in Part and Granting in Part Complainant’s Pet. for Recons.), and pending final disposition of Respondent’s appeal of *Goetz v.*

*Glickman*, 920 F. Supp. 1173 (D. Kan. 1996). On June 25, 1998, I issued a “Stay Order” granting Respondent’s Motion for a Stay pending the outcome of proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent’s Pet. for Recons. and Denying in Part and Granting in Part Complainant’s Pet. for Recons.), and pending final disposition of Respondent’s appeal of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996). *In re Jerry Goetz*, 57 Agric. Dec. 445 (1998) (Stay Order).

On November 26, 2001, Complainant filed a “Motion to Lift Stay.” On January 11, 2002, Respondent filed “Respondent’s Objection to Complainant’s Motion to Lift Stay Combined with Respondent’s Petition for Reconsideration and to Alter, Amend, or Set Aside the Prior Ruling in Light of Recent Change in Controlling Law” [hereinafter Respondent’s Objection to Complainant’s Motion to Lift Stay]. On January 15, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant’s Motion to Lift Stay.

#### **RULING ON COMPLAINANT’S MOTION TO LIFT STAY**

Respondent’s Objection to Complainant’s Motion to Lift Stay includes a petition for reconsideration of the November 3, 1997, Decision and Order. Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer’s decision must be filed within 10 days after service of the decision, as follows:

**§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite.* . . .

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

The Hearing Clerk served Respondent with the November 3, 1997, Decision and

Order on November 7, 1997.<sup>1</sup> Respondent filed Respondent's Objection to Complainant's Motion to Lift Stay on January 11, 2002, 4 years 2 months and 4 days after the date the Hearing Clerk served the November 3, 1997, Decision and Order on Respondent. Accordingly, Respondent's January 11, 2002, petition for reconsideration was late-filed and must be denied.<sup>2</sup>

Moreover, the Rules of Practice do not provide for filing more than one petition

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<sup>1</sup>Domestic Return Receipt for Article Number P 093 033 757.

<sup>2</sup>*In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months and 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months and 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months and 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

for reconsideration of a decision of the Judicial Officer.<sup>3</sup> On November 17, 1997, Respondent filed a Petition for Reconsideration of the Decision of the Judicial Officer, and on April 3, 1998, I issued an order denying Respondent's petition for reconsideration. *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Accordingly, Respondent's second petition for reconsideration, filed January 11, 2002, must be denied.

Furthermore, even if Respondent's January 11, 2002, petition for reconsideration were Respondent's first petition for reconsideration of the November 3, 1997, Decision and Order and had been timely filed, I would deny Respondent's January 11, 2002, petition for reconsideration.

Respondent contends the conclusion in the November 3, 1997, Decision and Order that the Beef Act's requirement that Respondent collect and remit assessments to fund beef and beef product promotion does not violate Respondent's right to free speech under the First Amendment to the Constitution of the United States, is no longer good law. Respondent cites *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), as the basis for his contention. Respondent requests that, in light of *United Foods, Inc.*, I alter, amend, or set aside the November 3, 1997, Decision and Order and strike down the Beef Act as an unconstitutional violation of Respondent's right to free speech under the First Amendment to the Constitution of the United States. (Respondent's Objection to Complainant's Mot. to Lift Stay at 5-11).

As an initial matter, *United Foods, Inc.*, does not address the Beef Act. Instead, *United Foods, Inc.*, addresses the constitutionality of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112). Specifically, the Supreme Court of the United States held that mandatory assessments on handlers of fresh mushrooms to fund advertising of the product violate the First Amendment right to free speech where the assessments are not ancillary to a more comprehensive program restricting market autonomy and the advertising itself is the principal object of the regulatory scheme. Respondent does not cite and I cannot locate any case in which a court has concluded that mandatory assessments under the Beef Act to fund beef and beef product promotion violate the First Amendment right to free speech. Instead, in cases cited by Respondent, courts rejected First Amendment challenges to mandatory assessments under the Beef

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<sup>3</sup>*Cf. In re Fitchett Bros., Inc.*, 29 Agric. Dec. 2, 3 (1970) (Dismissal of Pet. for Recons.) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

Act.<sup>4</sup> Therefore, even if Respondent's January 11, 2002, petition for reconsideration were Respondent's first petition for reconsideration of the November 3, 1997, Decision and Order and had been timely filed, I would reject Respondent's request that, based on *United Foods, Inc.*, I alter, amend, or set aside the November 3, 1997, Decision and Order and strike down the Beef Act as an unconstitutional violation of Respondent's right to free speech under the First Amendment to the Constitution of the United States.

Second, generally an administrative tribunal has no authority to declare unconstitutional a statute that it administers.<sup>5</sup> Respondent does not cite and I cannot locate any authority which gives me the power to "strike down the Beef Act as being unconstitutional," as Respondent requests. Therefore, even if Respondent's January 11, 2002, petition for reconsideration were Respondent's first petition for reconsideration of the November 3, 1997, Decision and Order and had been timely filed, I would reject Respondent's request that, based on *United Foods, Inc.*, I strike down the Beef Act as unconstitutional.

I issued the June 25, 1998, Stay Order to postpone the effective date of the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), pending proceedings for judicial review of *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), and *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.). Proceedings for judicial review of *Goetz*

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<sup>4</sup>*United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

<sup>5</sup>*Pubic Utilities Comm'n of California v. United States*, 355 U.S. 534, 539 (1958); *Gilbert v. NTSB*, 80 F.3d 364, 366-67 (9th Cir. 1996); *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983); *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979), *cert. denied sub nom. General Motors Corp. v. Costle*, 446 U.S. 952 (1980); *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976); *Montana Chapter of Association of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975); *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974); *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974); *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973); *Panitz v. District of Columbia*, 112 F.2d 39, 41-42 (D.C. Cir. 1940); *In re Otto Berossini*, 54 Agric. Dec. 886, 913 (1995); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342-43 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Craig Lesser*, 52 Agric. Dec. 155, 167-68 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re David G. Henner*, 30 Agric. Dec. 1151, 1259 (1971).

*v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), are concluded.<sup>6</sup> Proceedings for judicial review of *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), are also concluded.<sup>7</sup>

Respondent does not contend that he is seeking further judicial review of either *Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), or *In re Jerry Goetz*, 56 Agric. Dec. 1470 (1997), as modified by *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), and the time for filing further requests for judicial review has expired.

For the foregoing reasons, Complainant's Motion to Lift Stay Order is granted, the June 25, 1998, Stay Order is lifted, and the Order in *In re Jerry Goetz*, 57 Agric. Dec. 426 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.), is effective, as follows:

#### ORDER

1. Respondent Jerry Goetz, d/b/a Jerry Goetz and Sons, his agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) and, in particular, shall cease and desist from:

- (a) failing to remit all assessments when due;
- (b) failing to remit late-payment charges; and
- (c) failing to transmit reports in a timely manner.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent Jerry Goetz, d/b/a Jerry Goetz and Sons, is assessed a civil penalty of \$69,804.49 which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to:

Sharlene A. Deskins

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<sup>6</sup>*Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

<sup>7</sup>*Goetz v. United States*, 99 F. Supp.2d 1308 (D. Kan. 2000), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001), *cert. denied*, 122 S. Ct. 614 (2001).

United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2343 South Building  
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 70 days after service of this Order on Respondent.

3. Respondent Jerry Goetz, d/b/a Jerry Goetz and Sons, shall pay past-due assessments and late-payment charges of \$66,913 which shall be paid by certified check or money order, made payable to the Kansas Beef Council, and forwarded to:

Kansas Beef Council  
6031 SW. 37th Street  
Topeka, KS 66614-5129

Respondent's payment of the past-due assessments and late-payment charges shall be forwarded to, and received by, the Kansas Beef Council within 70 days after service of this Order on Respondent.

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